FORM NLRB-4479
(3-84)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Springfield, Missouri

Roper Electric Co. [1] Petitioner and IBEW Local 453 Union	Case 17-RM-854

DECISION AND ORDER

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6) (7)* of the Act for the following reasons:

Because I find that the Petitioner seeks an election in a bargaining unit narrower than the existing bargaining unit represented by the IBEW Local 453, and the Union does not seek to represent employees in the bargaining unit the Petitioner describes herein, I find that the instant petition does not raise a question concerning representation and must be dismissed. Under these circumstances, I find it unnecessary to address the Union's contention that it has a Section 9(a) bargaining relationship rather than a Section 8(f) bargaining relationship with the Petitioner.

[1] The Petitioner's name appears as amended at the hearing.

FACTS:

1. Inside Agreement

The Petitioner is a corporation engaged in the construction industry as a commercial inside wire electrical contractor at its facility located in Springfield, Missouri. Inside electrical work, also known as secondary wiring, is comprised of the installation or repair of wiring from the electrical pole to a building and the installation or repair of electrical wiring inside a building. There is no evidence that the Petitioner maintains any facility or office other than its facility in Springfield, Missouri. The Petitioner has been in operation for over eighty-five years and has had a collective bargaining relationship with the Union for at least the past sixty-five years. On or about August 15, 1986, the Petitioner signed a Letter of Assent-A with the Union. The Letter of Assent, which has never been cancelled and remains in effect, provides that the Petitioner authorizes the Kansas City Chapter, NECA, Springfield Division (NECA) as its collective bargaining representative for "all matters contained in or pertaining to the current approved Inside Wireman labor agreement" between NECA and the Union. The Petitioner acknowledges that at all times since August 15,1986 it has been bound by the "current Inside Wireman labor agreement" as provided by the Letter of Assent. The current Inside Wireman labor agreement (herein referred to as Inside Agreement) is effective by its terms from September 1, 2004 through August 31, 2007.

The Inside Agreement, Article II, Section 6 provides that the Petitioner "recognizes the Union as the exclusive representative of all its employees performing work within the jurisdiction of the Union for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of

employment". Article II, Section 7 of the Inside Agreement states that "the scope of work covered by this Agreement shall include the handling, assembling, installing, erecting, connecting, and maintaining of all equipment and apparatus and the handling of all materials required in the production and use of electricity." Article III, Section 4 of the Inside Agreement provides wage rates for various classifications of employees including: journeyman wireman, journeyman wireman (certification welding); journeyman wireman (certification splicing); foreman; general foreman; and apprentices. The Petitioner acknowledges that the Inside Agreement covers "light commercial electrical work" as well as the other electrical work performed by the Petitioner.

2. Memorandum of Understanding

In approximately 1998, NECA and the Union entered into a memorandum of understanding, titled Memorandum of Understanding Light Commercial Electrical Work. The purpose of the memorandum of understanding was to provide contractors bound by the NECA inside agreement with an exception to the economic terms of that agreement with regard to "light commercial electrical work" and thereby enable the contractors, under defined circumstances, to bid and perform "light commercial electrical work" at a lower economic rate than provided by the terms of the NECA inside agreement. The memorandum of understanding was referred to by the parties as a "market recovery tool" with the purpose of enabling signatory contractors to be competitive with non-union contractors in performing "light commercial work".

The Petitioner did not become signatory to the memorandum of understanding until approximately March 29, 2000, and the Petitioner did not appear to begin performing

work pursuant to the memorandum of understanding until 2001. The initial memorandum of understanding signed by the Petitioner in 2000 was replaced by a memorandum of understanding effective from September 1, 2001 through August 31, 2004. The current Memorandum of Understanding Light Commercial Electrical Work (MOU) between the Union and NECA is effective from January 1, 2005 through August 31, 2007. The Petitioner became signatory to the current MOU in early January 2005.

The language of the MOU expressly states that the parties are bound by the Inside Agreement and provides:

> "now therefore, the parties agree to the following Memorandum of Understanding to the aforementioned Agreement effective January 1, 2005, as follows:
>
> The Springfield Division, Kansas City Chapter, NECA, and other employers who utilize this Memorandum of Understanding, recognizes Local Union 453 of the International Brotherhood of Electrical Workers as the sole and exclusive representative for the purpose of collective bargaining conditions in respect to rates of pay, wages, hours of employment and other conditions of employment for all servicemen who are engaged in installation, operation and service work in connection with electrical work, but excluding all other employees, clerical employees, guards and supervisors as defined by the Labor Management Relations Act, 1947, as amended.
>
> All Employers subject to the terms of this Memorandum of Understanding will respect the work jurisdictional rules of the Union as they relate to all classifications of work covered by this Memorandum and shall not direct or require their employees or other persons, other than the employees in the bargaining unit here involved, to perform work which is recognized as the work of the employees in the said unit"

The MOU defines light commercial work as:

> "new construction, remodel, repair and replacement work in commercial buildings, strip shopping centers, metal buildings, retail and tenant finish and office buildings. In addition, apartment buildings and condominiums may also fall under this definition. This Memorandum excludes work in manufacturing, industrial, and hospitals, except where a bona fide exception has been approved by the parties hereto and set forth in writing".

The MOU includes a form titled “Request For Use Of Memorandum of Understanding”. The MOU requires contractors desiring to use the terms of the MOU to apply to the Union for permission to apply the terms of the MOU on a specific job or project. The request form states “in accordance with the provision of the current collective bargaining agreements, the parties hereby agree to the modifications as outlined below”. The request form then sets forth blanks spaces where the wage rate to be paid, job name, and job location and other modifications to the otherwise applicable collective bargaining agreement(s) are to be filled in. The request form also specifically states at the bottom: “with the exceptions of the above modifications, the terms and conditions of the current collective bargaining agreement shall remain in full force and effect until the completion of this job”. In addition, the MOU provides that the parties reserve the right to change or terminate the MOU “at any time” upon 60 days written notification to the other party.

Since becoming signatory to the successive memoranda of understanding described above, the Petitioner has requested and received approval from the Union to apply the terms of the memoranda of understanding to a number of jobsites. In addition, the Petitioner has continued to perform work under the economic terms set forth in the Inside Agreement.

3. Other Contracts

In addition to successive “market recovery” memoranda of understanding regarding light commercial work, the Union and NECA have entered into a “stand alone” light commercial contract. The last such contract expired on August 30, 2004. The Union has

declined to enter into negotiations with NECA regarding a successor contract and NECA is pursuing a grievance seeking to compel the Union to negotiate a successor agreement. The Petitioner has never been signatory to the "stand alone" light commercial contract.

Moreover, the Union and NECA have entered into Residential Wire Agreements, the most recent of which expired on August 31, 2004. There is no evidence that the Petitioner has ever been signatory to a Residential Wire Agreement.

POSITIONS OF PARTIES:

The Petitioner contends that the MOU in fact created a separate bargaining unit from the bargaining unit described by the Inside Agreement, that the Union has represented the employees in the separate bargaining unit established by the MOU, and the Petitioner seeks an election in the "light commercial electrical work" bargaining unit allegedly created by the MOU. At the hearing the Petitioner described the "light commercial electric work" bargaining unit as being comprised of "light commercial" journeymen, apprentices, helpers, and probationary employees employed by the Petitioner. In its brief, the Petitioner seeks to include "residential wiremen" in the "light commercial electrical work" bargaining unit, although there does not appear to be any evidence that the Petitioner performs residential electrical work. The Petitioner further asserts that it has a Section 8(f) bargaining relationship with the Union in both the bargaining unit described in the Inside Agreement and the bargaining unit the Petitioner asserts is described in or covered by the MOU, and therefore those agreements do not constitute a contract bar to an election. In this regard, the Petitioner acknowledges that the Union presented signed authorization cards to the Petitioner in November 2004.

However, the Petitioner asserts that the card check failed to demonstrate the Union represented a majority in either the "light commercial electric work" bargaining unit allegedly established by the MOU or the bargaining unit established by the Inside Agreement. There are approximately 18-20 employees in the "light commercial" bargaining unit.

Contrary to the Petitioner, the Union contends that the MOU is not a collective bargaining agreement and that the MOU does not create, carve out, or cover a separate collective-bargaining unit from the overall bargaining unit described by the Inside Agreement. The Union states that it has never represented a separate bargaining unit comprised solely of employees employed by the Petitioner engaged in "light commercial electrical work" covered by the MOU and that the Union does not seek to represent the Petitioner's "light commercial electrical work" employees who perform work pursuant to the MOU in a separate bargaining unit. Rather, the Union asserts that it has historically represented Petitioner's employees who perform "light commercial electrical work" in the overall bargaining unit described in the Inside Agreement regardless of whether the terms of the MOU were applied to the jobsites where the work was performed. Accordingly, the Union asserts that under *Sonic Knitting*, 228 NLRB 1319 (1977), the petition herein must be dismissed because the Petitioner seeks an election in a narrower bargaining unit than the existing bargaining unit and because the Union does not seek to represent employees in the bargaining unit described by the Petitioner. Further, the Union contends that in November 2004, the Union demonstrated its majority status in the overall bargaining unit described in the Inside Agreement by presenting signed authorization cards to the Petitioner. The Union asserts that at all times subsequent to

November 2004, it has enjoyed a Section 9(a) bargaining relationship with the Petitioner rather than a Section 8(f) bargaining relationship. Accordingly, the Union asserts that given its Section 9(a) bargaining relationship, the current Inside Agreement constitutes a contract bar to an election should the Petitioner seek an election in the bargaining unit described in the Inside Agreement. Finally, the Union suggests in its brief that since November 2004 the scope of the bargaining unit has been a multi-employer bargaining unit comprised of all contractors bound by the NECA Inside Agreement with which the Union has a Section 9(a) rather than a Section 8(f) bargaining relationship. The Union did not name any other NECA contractors with which it claims it has a Section 9(a) bargaining relationship.

ANALYSIS/DETERMINATION:

1. Scope of the Existing Unit

I find that the Union currently represents and has historically represented a single bargaining unit of the Petitioner's employees. I further find that the current and historical bargaining unit is set forth and described in the Inside Agreement and that the unit includes employees who perform light commercial electrical work, regardless of whether the light commercial electrical work is performed under the economic terms of the Inside Agreement or the MOU. The MOU is not separate bargaining agreement, but rather is simply an addendum or modification of the Inside Agreement collective bargaining agreement. The MOU does not establish, describe, or apply to a separate "light commercial electric work" bargaining unit of the Petitioner's employees. I find that the Petitioner has failed to establish that the Union has ever represented, claimed to

represent, or sought to represent a separate bargaining unit comprised of the Petitioner's employees who perform "light commercial electrical work" pursuant to the MOU.

In making the determination set forth above, I have considered the terms of the MOU itself; the practice of the parties in applying the terms of the MOU; and the arguments raised by the parties at hearing and in their briefs.

The terms of the MOU are not consistent with finding either that the MOU is a separate and distinct bargaining agreement from the Inside Agreement or that the parties intended the MOU to create a separate bargaining unit. The MOU expressly states that it is a modification, not a replacement of, the Inside Agreement. The MOU sets forth a bargaining unit that is co-extensive with, rather than a portion of, the overall bargaining unit described in the Inside Agreement. The MOU provides a potential exception to the Inside Agreement with regard to economic terms, but does not supplant the Inside Agreement. Non-economic terms and conditions of employment set forth in the Inside Agreement are applicable even when the economic terms of the MOU are applied to a jobsite. Application of the terms of the MOU are not automatic, but rather the Petitioner must submit a request form to the Union asking to apply the MOU to a specific job or project. Application of the terms of the MOU are completely voluntary. The Petitioner may choose not to request the use of the MOU to a particular job and the Union has the unilateral right to reject any request for application of the MOU from the Petitioner. Either party may terminate the MOU upon 60 days notice. There was no evidence submitted at hearing that the parties intent in signing the MOU or the preceding memoranda of understanding was to create a separate bargaining unit from the overall

bargaining unit. Further, there was no evidence that either the Petitioner or the Union has treated the MOU as establishing a separate bargaining unit.

There does not appear to be any basis to distinguish the kind of "light commercial electrical work" performed under the MOU from the "light commercial electrical work" performed under the standard terms of the Inside Agreement. Light commercial work performed the MOU and the Inside Agreement appear identical, except that in the case of the MOU, the parties have agreed for competitive purposes to permit unit employees to perform the work at a lower economic rate. Contrary to the assertions of the Petitioner, the evidence fails to establish that the Petitioner structured its business so as to create a separate and distinct bargaining unit comprised of "light commercial electric work" performed pursuant to the terms of the MOU. There is no evidence that the Petitioner has established a new or separate facility, corporate division, or a separate department within its facility to perform light commercial electrical work pursuant to the MOU. Rather, all of Petitioner's employees work out of the same facility, perform the same types of work, and work under the same basic working conditions. The Petitioner signed the MOU, as well as the memoranda of understanding previously in effect, with the name "Roper Electric Co." without reference to a separate corporate division. All of the forms submitted by the Petitioner to the Union to request application of the terms of the memoranda of understanding or MOU have used the name "Roper Electric Co." The Petitioner's management structure includes Scott Peters, who has overall responsibility for Petitioner's operations, and Chris Bartel, project manager, who reports to Peters. Both Peters and Bartel oversee all work, including work performed under the economic terms of the MOU as well as work performed under the economic terms of the Inside

Agreement. Directly below Bartel are the working foremen, who are journeyman electricians covered by and paid in accordance with the terms of the Inside Agreement regardless of whether they are working on a job or project where the terms of the MOU are applicable. Accordingly, employees working on jobsites where the economic terms of the MOU are applied work side-by-side with working foremen who are paid pursuant to the economic terms of the Inside Agreement. The same working foremen are assigned to jobsites covered by the Inside Agreement as well as jobsites where the parties have agreed to apply the economic terms of the MOU. The Petitioner staffs all of its jobs with referrals from the Union, including jobs or projects where the economic terms of the MOU are applicable. There is no showing that employees referred to jobsites where the economic terms of the MOU are applicable possess separate or distinct job skills. Moreover, the record shows that some employees have worked for the Petitioner on jobs where the economic terms of the MOU were applied as well as jobs where the terms of the MOU were not applied. In summary, the record fails to establish that employees working on jobs where the economic terms of the MOU were applied constitute a separate or distinct bargaining unit or that they were treated as members of a separate bargaining unit by either the Petitioner or the Union.

Accordingly, *South Prairie Construction Co., v. Operating Engineers Local 627*, 425 U.S. 800 (1976) cited by the Petitioner, is distinguishable because in *South Prairie Construction Co.* there were shown to be distinct groups of employees who performed separate and distinct types of work and accordingly, separate bargaining units were found. Further, because the evidence herein establishes that there is no new work, no new job classifications, and no new employer facility involved, I find the various Board

cases cited by the Petitioner involving accretion, relocation, and transfer of employees to a new facility are not applicable.

2. Petition Does Not Raise A Question Concerning Representation

As a general rule an employer's RM petition must be based on a union's claim to be the bargaining representative of certain of the employer's employees and the voting unit described in the RM petition generally must be the unit claimed by the union to be appropriate. See *Carr-Gottstein Foods Company, Inc*., 307 NLRB 1318, page 1319 (1992) citing *Sonic Knitting Industries*, 228 NLRB 1319 (1977). Section 102.61 of the Board's Rules requires that an employer's RM petition contain a brief statement that the union has presented to the employer a claim to be recognized as the exclusive representative of the employees in the unit claimed to be appropriate. Absent a claim for recognition in the petitioned-for unit, the Board will normally dismiss an RM petition on the ground that no question concerning representation (QCR) exists. See *Woolwich, Inc.*, 185 NLRB 783 (1970), and *Amperex Electronic Corp.*, 109 NLRB 353 (1954).

The Employer takes the position that the MOU establishes a separate unit and, as it is an 8(f) agreement, the Employer can file a petition raising a QCR based solely on the contract. To the contrary, the Union claims the bargaining unit sought by the Petitioner in the instant RM petition is not appropriate and the Union asserts that it does not seek to represent employees in the bargaining unit the Petitioner describes or seeks in the instant RM petition. The Petitioner's evidence fails to establish that the Union's past or present actions are inconsistent with the Union's stated claims. Rather, the evidence establishes that the current bargaining unit as well has the historical bargaining unit includes all the

Petitioner's employees engaged in electrical work, including those employees engaged in light commercial electrical work who work on jobsites where the economic terms of the MOU have been applied. Thus, the MOU did not create a separate and distinct bargaining unit. Accordingly, the Petitioner's RM petition fails to raise a question concerning representation and will be dismissed.

3. Section 8(f) or Section 9(a) Bargaining Relationship

Based on my finding that the RM petition fails to raise a question concerning representation and will be dismissed, I find it unnecessary to address the issue of whether the November 2004 card check converted the parties' Section 8(f) bargaining relationship into a Section 9(a) bargaining relationship, the contract bar issue raised by the Union, or the issue regarding whether a single-employer or multi-employer unit is appropriate.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by November 14, 2005.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, D.C. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

Dated October 31, 2005

at Overland Park, Kansas

/s/ D. Michael McConnell

Regional Director, Region 17